No. 82-510

[redacted] DEVELOPMENT COMPANY,
Petitioner,

v.

THE [redacted] ASSOCIATION OF OKLAHOMA AND THE ILLINOIS RIVER CONSERVATION COUNCIL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

FLINT RIDGE DEVELOPMENT COMPANY,
*Petitioner**

v.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA AND THE ILLINOIS RIVER CONSERVATION COUNCIL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner Flint Ridge Development Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this case on 30 July 1975.

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*Counsel for petitioner has been advised that the Solicitor General of the United States will file a petition for a writ of certiorari in this case on behalf of the Secretary of Housing and Urban Development.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported. It appears as Appendix A. The opinion of the District Court is reported at 382 F.Supp. 69 (E.D. Okla. 1974). It appears as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered 30 July 1975. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether there is "major Federal action[] significantly affecting the. . .environment" requiring an environmental impact statement under the National Environmental Policy Act in connection with the filing of a registration-antifraud disclosure statement under the Interstate Land Sales Full Disclosure Act where the Department of Housing and Urban Development's authority is limited to checking to determine whether the statement appears to be complete and accurate on its face.

2. Whether the environmental impact statement requirement of the National Environmental Policy Act overrides section 1706(a) of the Interstate Land Sales Full Disclosure Act which affirmatively authorizes interstate land sales 30 days after filing a registration-antifraud disclosure statement complete and accurate on its face with the Department of Housing and Urban Development when 30 days is not long enough to complete an environmental impact statement.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4332(2)(C) - 4335, and the Interstate Land Sales Full Disclosure Act (ILSA), 15 U.S.C. §§ 1706(a), (b), and (d) and 1716, are set forth in Appendix C.

STATEMENT OF THE CASE

This case arises out of a determination of the Secretary of Housing and Urban Development that the filing of a registration-antifraud disclosure statement by a developer pursuant to the Interstate Land Sales Full Disclosure Act does not require preparation of an environmental impact statement under the National Environmental Policy Act of 1969 (NEPA).

The Interstate Land Sales Full Disclosure Act (ILSA), 15 U.S.C. § 1701, *et seq.*, directly patterned after the Securities Act of 1933, 15 U.S.C. § 77a, *et seq.*, was passed to eliminate fraud in interstate land sales. Under § 1706(a) of ILSA, the sale of lots in interstate commerce can begin 30 days after the developer files a registration-antifraud disclosure statement (statement of record) with the Department of Housing and Urban Development (HUD). The statement of record thus automatically becomes "effective" 30 days after filing. If it appears to HUD that the statement of record is

incomplete or inaccurate on its face, its effective date can be suspended, which has the effect of preventing sales from commencing, until 30 days after the developer corrects its statement of record. ILSA § 1706(b). If it appears to HUD that an effective statement of record is fraudulent, it may be suspended, which has the effect of halting sales, until the developer corrects its statement of record. ILSA § 1706(d).

The developer is required to furnish to purchasers prior to sale a portion of the statement of record filed with ILSA, called a property report, which contains necessary information, such as condition of the title, existence of roads and utilities, range of selling prices, upon which a purchaser can make his or her own determination of the economic value of the lot. ILSA § 1703(a)(1).

ILSA provides that the fact that a statement of record has been filed or is in effect "... shall not be ... held to mean that the Secretary has in any way passed upon the merits of, or given approval to, such subdivision." ILSA § 1716.

Petitioner Flint Ridge Development Company (Flint Ridge) is a private joint venture organized to develop and sell lots in a subdivision located in eastern Oklahoma.

In May 1973, after site selection, financing, and planning, the construction of utilities, roads and other common improvements in the development began [R533].

In February 1974, Flint Ridge filed its statement of record with HUD [R691]. Within 30 days HUD notified Flint Ridge that its statement of record was incomplete and inaccurate on its face [R694]. On 2 May 1974, 30 days after filing its corrections, Flint

Ridge's statement of record became effective by operation of law [R690].

Respondents, environmental groups, in the interim, filed a demand on HUD that prior to "approval" of Flint Ridge's statement of record, HUD must prepare an environmental impact statement on the development [R693]. HUD determined that an environmental impact statement was not required because its checking of a statement of record and requiring correction thereof was not a major Federal action significantly affecting the environment [R696].

Respondents filed a complaint in the District Court on 21 April 1974 seeking judicial review of HUD's determination. The District Court concluded that it had jurisdiction, apparently under 28 U.S.C. § 1331(a).

The District Court suspended the effectiveness of Flint Ridge's statement of record, prohibited public sale of lots thereunder, and enjoined HUD from "approving" the statement of record until HUD prepared an environmental impact statement.[1] The District Court did not find, however, that Flint Ridge's statement of record which became effective 2 May 1974 was incomplete, inaccurate or fraudulent.

The Court of Appeals affirmed in pertinent part on the ground that "major federal action significantly

[1] The District Court conducted a trial on the environmental impact of the Flint Ridge Development. Among other things, it found and the Court of Appeals recited that seepage from septic tanks in the development would pollute the Illinois River – notwithstanding Oklahoma State Law regulating septic tanks and prohibiting pollution therefrom. This finding was not appealed *only* because Flint Ridge maintains that it is irrelevant to the issues.

affecting. . . the environment was present" because of "the consequences of the government's approval of the statement [of record] in terms of ease of obtaining funds and in terms of the ultimate direct consequences on the environment of the building of the houses. . . ." (App. A, *infra*, p. 9a). The Court of Appeals also found that there was no conflict between the ILSA provision which automatically authorizes sales 30 days after filing or correction of a statement of record and the environmental impact statement requirement of NEPA which concededly could not be satisfied in 30 days because "[t]here is nothing in the statute, however, which prohibits the agency from suspending a statement of record pending the preparation and filing of an impact statement." (App. A, *infra*, p. 9a).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW ERRONEOUSLY CONVERTS THE NEPA STANDARD OF MAJOR FEDERAL ACTION INTO *ANY* FEDERAL ACTION AND THUS HIGHLIGHTS THE IMMEDIATE NEED FOR GUIDANCE BY THE COURT ON WHAT FEDERAL ACTIVITIES DO *NOT* CONSTITUTE "MAJOR FEDERAL ACTION SIGNIFICANTLY AFFECTING. . . THE ENVIRONMENT" REQUIRING AN ENVIRONMENTAL IMPACT STATEMENT.

The decision below is one of first impression in finding major Federal action significantly affecting the environment solely because of ". . . the consequences of the government's *approval* of the statement [of record]

in terms of *ease* of *obtaining funds* and in terms of the ultimate direct consequences on the environment of the building of the houses. . . " (Emphasis supplied) (App. A, *infra*, p. 9a). The organic statute involved, however, specifically disclaims "approval" by the government and only allows the government to review a private party's antifraud disclosure document. The Court of Appeals erroneously attempts to treat its decision as a modest extension of existing case law when in fact it is a wide departure. In attempting to rationalize the true implications of its decision, the Court of Appeals relies solely on cases which are inapposite, and if anything suggest that major Federal action is *not* involved in this case. All of the cases relied upon by the decision below involved organic statutes granting Federal control over, direct involvement in, or approval and funding of private activities that affect the environment.

In the Congressional debates, Senator Williams, the chief sponsor, described the Interstate Land Sales Full Disclosure Bill as follows:

> "It is not a regulatory statute which will permit the Federal Government to pass upon such questions as land value, its selling price, land use, or zoning. The only purpose of this legislation is to give the purchaser the necessary information upon which he can make his own investment decision."
>
> 114 Cong. Rec. 15270 (1968); *See also*, S. Rep. No. 1123, 90th Cong., 2d Sess. at 110 (1968).

The Interstate Land Sales Full Disclosure Act (ILSA), 15 U.S.C. § 1701, *et seq.*, directly patterned after the Securities Act of 1933, 15 U.S.C. § 77a, *et seq.*,[2] was

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[2] 111 Cong. Rec. 27310-11 (1965) (remarks of Sen. Williams introducing S.2672, the Interstate Land Sales Full Disclosure Bill); 113 Cong. Rec. 315-16 (1967) (remarks of Sen. Williams reporting S.275, the Interstate Land Sales Full Disclosure Bill,

passed to eliminate fraud in interstate land sales. Under ILSA, the land developer files a registration-antifraud disclosure statement (statement of record) with the Department of Housing and Urban Development (HUD). HUD reviews the statement of record for completeness and accuracy on its face. Under ILSA, HUD has no authority whatsoever over the land developer, or purchasers of its land, other than the accuracy and completeness of the statement of record and fraud.

ILSA, which governs the contents of a statement of record provides:

> "The fact that a statement of record with respect to a subdivision . . . is in effect shall *not* . . . be held to mean . . . [HUD] has in any way *passed upon* the merits of, or given *approval* to, such subdivision."
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> 15 U.S.C. § 1716 (Emphasis supplied).

If the disclosure requirements of ILSA are met by the developer, HUD has no discretion whatsoever, except that it may shorten the period in which a statement of record becomes effective.

The National Environmental Policy Act of 1969 (NEPA) commands "all agencies of the Federal Government" to prepare an environmental impact statement whenever they propose to undertake "major Federal actions significantly affecting the . . . environment." 42 U.S.C. § 4332(2)(C).

The court below based its finding of major Federal action on three lines of cases which involved matters

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out of Committee). The bills introduced in 1965 and 1967 contained provisions that would have entrusted administration of land sales disclosure to the Securities and Exchange Commission. *Id.*

"*similar* to that here presented," a condition "*not far different* from ours" and an "*analogy*" (App. A, *infra*, pp. 7a, 8a) (Emphasis supplied), thus treating its decision as no more than a modest extension of existing law rather than what it is – a radical departure. Each of the organic statutes involved in the cases relied upon by the court below provides Federal control over, involvement in, or approval and funding of the project. They stand in stark contrast to ILSA, which gives HUD no such authority.

The principal case relied upon by the court below as "similar" is *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972). This case involved a lease of "restricted" Indian lands. The relevant portion of the organic statute, however, provides:

> "Any restricted Indian lands . . . may be leased by the Indian owners, with the **approval** of the Secretary of Interior . . . and all leases and renewals shall be made under such **terms and regulations** as may be **prescribed** by the **Secretary** of the Interior."
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> 25 U.S.C. § 415(a) (Emphasis supplied).[3]

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[3]The organic statute in Greene County Planning Board v. FPC, 455 F.2d 412 (2d Cir. 1972), in pertinent part provides:

> "[a]ll licenses issued . . . shall be on the following conditions: (a) That the project adopted . . . shall be such as in the **judgment** of the Commission will be best adapted to a comprehensive plan . . . and if necessary . . . the Commission shall have authority to **require the modification** of any project . . . before **approval**." 16 U.S.C. § 803 (Emphasis supplied).

The organic statute in Izaak Walton League of America v. Schlesinger, 337 F.Supp. 287 (D.C. D.C. 1971), in pertinent part provides

The eight cases involving conditions "not far different from ours" include *San Francisco Tomorrow v. Romney*, 472 F.2d 1021 (9th Cir. 1973). However, that court described the organic statute as follows:

> "The provisions of the Housing Act of 1949, 42 U.S.C. § 1450 et seq., . . . enable basically a contractual relationship between a locality and HUD . . . . A loan or a grant, or both, may be made from the federal government to the locality. The Secretary may establish reasonable requirements for the program which must be complied with prior to the entering into [sic] a contract with the locality. These requirements operate as conditions precedent to the formation of the contract. § 1453. . . . This statutory scheme thus provides for local adoption of a plan, **adjustment** of the **plan to meet HUD requirements** and finally entry into an **enforceable contractual relationship with HUD.**"

472 F.2d at 1023, n.1 (Emphasis supplied).[4]

"[s]uch licenses [construction of nuclear reactors] shall be issued . . . subject to such **conditions** as the Commission may by rule or regulation establish . . ." 42 U.S.C. § 2133(a) (Emphasis supplied).

The regulation at issue in *Schlesinger*, 10 C.F.R. Part 50, Appendix D, Section D.3, in pertinent part provided

> ". . . the Commission may issue a license for limited operation after **consideration** and **balancing** of the factors . . . and upon making the appropriate **findings** on the matters specified . . . ." (Emphasis supplied).

[4]The organic statute in Proetta v. Dent, 484 F.2d 1146 (2d Cir. 1973), in pertinent part provides:

> "[f]inancial assistance under this section shall be on such **terms and conditions** as the Secretary **determines** . . ." 42 U.S.C. § 3142(b) (Emphasis supplied).

The organic statute in Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973), is the Housing Act of 1949 discussed under San Francisco v. Romney, *Id.*

The principal case relied upon by the court below as providing an "analogy" is *Sierra Club v. Lynn*, 502

The organic statute in Silva v. Romney, 473 F.2d 287 (1st Cir. 1973), in pertinent part provides:

> "[t]he property or project shall – (A) comply with such **standards and conditions** as the **Secretary** may **prescribe** to establish the acceptability of the property for mortgage insurance . . . ." 12 U.S.C. § 1715z-1(j)(5) (Emphasis supplied).

The organic statute in Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693 (2d Cir. 1972), in pertinent part provides for the

> ". . . **approval** [by the Secretary of Commerce of] **surveys, plans, specifications** and **estimates** [of proposed highway projects]." 23 U.S.C. § 106(a) (Emphasis supplied).

The organic statute in City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972), in pertinent part provides:

> "[a]ll airport development projects shall be subject to the **approval** of the Secretary, which approval may be given only if he is **satisfied** that . . . [and] [n]o airport development project may be **approved** by the Secretary unless he is **satisfied** that fair consideration has been given to the interest of communities in or near which the project may be located." 49 U.S.C. §§ 1716(c)(1) and (3) (Emphasis supplied).

The organic statute in Upper Pecos Association v. Stans, 452 F.2d 1233 (10th Cir. 1971), vacated and remanded to determine mootness, 409 U.S. 1021 (1972), in pertinent part provides that the Secretary of Commerce is authorized to make grants

> ". . . if he **finds** that – (A) the project for which financial assistance is sought will directly or indirectly . . . primarily benefit the long-term unemployed and members of low-income families or otherwise substantially further the

F.2d 43 (5th Cir. 1974). That court, however, described the operation of the organic statute (Urban Growth and New Community Development Act of 1970 (Title VII), 42 U.S.C. § 4501, *et seq.*) as follows:

> "After a developer has successfully traversed the application process and accepted an offer of commitment, **the terms and conditions** under which he must operate **are negotiated with HUD and executed in a project agreement.** A trust indenture and a development plan must set out . . .(iv) the pace, scope and detail of the developer's undertakings in terms of 1-year, 3-year and long-term periods. These documents are incorporated into the project agreement and, hence, ars [sic] enforceable at law. In addition, the developer is required each year to submit a new 1-year and 3-year plan and, if changed conditions warrant substantial alterations, a revised long-term plan. Substantial changes in any part of the development plan require **approval by the Secretary.**"
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> 502 F.2d at 53.[5]

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objectives of the Economic Opportunity Act of 1964 . . ." 42 U.S.C. § 3131(a) (Emphasis supplied).

The organic statute in Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971), in pertinent part provides that

> "[t]he Administration shall make grants . . . [for an] **approved** comprehensive State plan . . . No state plan shall be **approved** as comprehensive unless the Administration **finds** that the plan provides for the allocation of adequate assistance to deal with law enforcement . . . ." 42 U.S.C. § 3733(a) (Emphasis supplied).

The court found that the agency could impose conditions as to the making of a grant. 451 F.2d at 1135 and 1137.

[5]The organic statute in Silva v. Lynn, 482 F.2d 1282 (1st Cir. 1973), was the same as that in Silva v. Romney, *op. cit.*

Thus, the decision below poses the fundamental policy question of whether a Federal agency which has no substantive responsibility for, or authority over, those activities of a private party which affect the environment is required by the National Environmental Policy Act to bar sales until the agency completes an environmental impact statement on those private activities.

2. BY FRUSTRATING THE STATUTORY SCHEME OF THE INTERSTATE LAND SALES FULL DISCLOSURE ACT, THE DECISION BELOW CONFLICTS WITH THE PRINCIPLE ANNOUNCED BY THE COURT IN SCRAP I THAT NEPA DOES NOT SUB SILENTIO AMEND OR REPEAL BY IMPLICATION ANY OTHER STATUTE.

In *United States v. S.C.R.A.P.*, 412 U.S. 669 (1973) (SCRAP I), the Court faced the question of whether the National Environmental Policy Act (NEPA) sub silentio amended or repealed by implication section 15(7) of the Interstate Commerce Act. The District Court enjoined the Interstate Commerce Commission (ICC) from permitting and the railroads from collecting an interim surcharge on transportation of recyclable goods on the ground that the ICC orders refusing to suspend the surcharge were unlawful under section 102(2)(C) of NEPA because they constituted major Federal action significantly affecting the environment for which the ICC had not prepared an environmental impact statement. The District Court found that NEPA empowered it to issue the injunction notwithstanding the holding in *Arrow Transportation Co. v. Southern Ry.*

Co., 372 U.S. 658 (1963), that section 15(7) vested in the ICC the sole and exclusive power to temporarily enjoin collection of rates and withdrew such power from the judiciary. The Court concluded that NEPA did not repeal by implication section 15(7) of the Interstate Commerce Act:

> "The statutory language, in fact, indicates that *NEPA was not intended to repeal by implication any other statute.* Thus, 42 U.S.C. § 4335 specifies that '[t]he policies and goals set forth in [NEPA] are supplementary to those set forth in existing authorizations of Federal agencies,' and 42 U.S.C. § 4334 instructs that the Act 'shall [not] in any way affect the specific statutory obligations of any Federal agency. . . .' Rather than providing for any wholesale overruling of prior law, NEPA requires all federal agencies to review their 'present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of [NEPA] and shall propose to the President . . . such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in [NEPA].' 42 U.S.C. § 4333. It would be anomalous if Congress had provided at one and the same time that federal agencies, which have the primary responsibility for the implementation of NEPA, must comply with present law and ask for any necessary new legislation, but that the courts may simply ignore what we described in *Arrow* as 'a clear congressional purpose to oust judicial power . . . .' "
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> 412 U.S. at 694-95 (Emphasis supplied and footnotes omitted).

ILSA is a carefully devised statutory scheme to prevent fraud without imposing stifling regulatory burdens on the economically important business of interstate land sales. The statutory scheme is a simple one. The developer must file a registration-antifraud disclosure statement called a statement of record with HUD. Section 1706(a) of ILSA provides for a statement of record to *automatically* become "effective" 30 days after filing and the developer may then begin sales. Under section 1706(b), the effective date of a developer's statement of record can be suspended only if a statement of record appears to HUD to be ". . . on its face incomplete or inaccurate in any material respect . . . ." In that event, the effective date is suspended only until 30 days after the developer files the necessary corrections in its statement of record. Under section 1706(d), an effective statement of record can be suspended only if it contains an untrue statement of material fact or omits a material fact. In that event, the statement of record remains suspended only until the developer files the necessary corrections. The effect of suspension is to stop sales from beginning or halt sales in progress. The power of HUD to suspend, therefore, comes into play *only* if the *developer* fails to make the required disclosure – and not because of anything HUD either does or fails to do. HUD has no discretion to suspend a statement of record for any other reason. ILSA neither requires nor allows HUD to make any judgment about the merits of the underlying development. Congress thus devised a statutory scheme that gives HUD suspension power to prevent fraud but erects a barrier against *Government caused delay* beyond the initial 30 day period.

It is undisputed that an environmental impact statement under NEPA cannot be completed in 30 days.[6] Thus, ILSA gives HUD 30 days to act, absent incomplete disclosure, but HUD cannot complete an environmental impact statement in 30 days.[7] The decision below concludes that the effective date of a statement of record must be suspended beyond the 30 days *solely* because HUD must first complete an environmental impact statement. This results in an open-ended delay in bringing land to market. The statutory scheme of ILSA that authorizes a developer to begin sales 30 days after filing or correcting a statement of record and prohibits Government caused delay thereafter is repealed by the decision below.

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[6]The Council on Environmental Quality Guidelines for Preparation of Environmental Impact Statements, 40 C.F.R. § 1500.9(f), which are advisory, state that other Federal agencies, which must be consulted under § 102(2)(C) of NEPA, should be given not less than 45 days to comment on the draft environmental impact statement.

[7]The decision below suggests that this operational conflict between ILSA and NEPA could be accommodated in the following way:

> "Thus, a developer could give advance notice to HUD of its intent to sell land in interstate commerce, whereby HUD could commence the preparation of its impact statement." (App. A, *infra*, p. 9a).

In order to begin preparing an environmental impact statement, however, HUD must at the very least know what a developer plans to do with the land, including the size, location and number of lots, utilities, sewers, roads and other improvements. When a developer knows that information he is prepared to file his statement of record. Thus, if the developer refrains from filing in order to give HUD "advance notice," the Government caused delay is merely shifted forward.

There is no reason, however, to frustrate the statutory scheme of ILSA in order to provide for environmental disclosure. For example, HUD could initiate a rulemaking proceeding to require environmental disclosure in statements of record – consistent with the statutory scheme of ILSA. *See, Natural Resources Defense Council v. SEC*, 389 F.Supp. 689 (D.C. D.C. 1974). Respondents requested no such relief from HUD or from the District Court.

The decision below defeats the statutory scheme of ILSA and thus conflicts with the principle announced by the Court in SCRAP I that NEPA does not repeal by implication any other statute.

3. THE SIGNIFICANCE OF THE ISSUES BEFORE THE COURT AND THE MAGNITUDE OF THE ERROR BELOW IS UNDERSCORED BY THE WIDE IMPACT OF THE DECISION BELOW.

In the year ended 31 December 1973, 3,568 statements of record were filed with HUD under ILSA.[8] The decision below would not only immediately bring to a halt for an indefinite period of time the enormous land sales industry presently subject to ILSA but would *also* build in substantial delay into all such future projects.

HUD's duties and powers under ILSA are precisely the same with respect to each development that is

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[8]1973 HUD Statistical Handbook 292.

subject to the registration-antifraud disclosure requirements met by filing a statement of record. The decision below prohibits the Flint Ridge Development Company from selling lots until HUD prepares an environmental impact statement under NEPA. Thus, except in the rare case where it can be shown that a development will have an insignificant effect on the environment or some statutory registration exemption is available, sales of *any* lots in the United States cannot begin until HUD completes an environmental impact statement on those developments.

One need only examine the Council on Environmental Quality's Guidelines on Preparation of Environmental Impact Statements, 40 C.F.R. §1500.8, to conclude that independent analysis of the mass of information and data required in an environmental impact statement is a substantial job. When this is combined with the requirements for interagency review, the experience of Federal agencies demonstrates that an adequate environmental impact statement cannot be expected to be completed in less than a year.

ILSA was patterned directly after the Securities Act of 1933. The Securities Act of 1933 also requires the filings of a registration-antifraud disclosure statement as a prerequisite to use of the means of interstate commerce for the sale of securities subject to the Act. In the fiscal year ended 30 June 1974, 2,890 registration statements were filed with the Securities and Exchange Commission under the Act.[9] The decision below is direct precedent for not only immediately interrupting for an indefinite period of

[9] 40th Annual Report, Securities and Exchange Commission 167.

time access to the public securities market for funds for industrial and housing construction that significantly affects the environment but *also* for building in substantial delay in all such future financing and construction while the Securities and Exchange Commission prepares environmental impact statements.

The one or more years' delay imposed on land development projects will result in substantial additional interest costs during the time required for HUD to complete environmental impact statements. It is difficult to determine the ultimate number of developers who will be thrown into bankruptcy by this unanticipated burden of delay, particularly in present market conditions. At the very least, the decision below will substantially delay present *and* future land development. In some cases it will result in outright abandonment.

Particularly in this time of drastic unemployment and critical need for additional capital for plant and housing construction, our economy cannot risk the burden imposed by the decision below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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2 October 1975

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 74-1520 and 74-1750

Filed: July 30, 1975

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA and THE ILLINOIS RIVER CONSERVATION COUNCIL, corporations, Plaintiffs-Appellees,	)	
v.	)	
JAMES T. LYNN, Secretary of Housing and Urban Development, and GEORGE K. BERNSTEIN, Administrator of Interstate Land Sales, Department of Housing and Urban Development, Defendants-Appellants,	)	Appeal from the United States District Court for the Eastern District of Oklahoma (D.C. No. 74-131-C)
and	)	
FLINT RIDGE DEVELOPMENT COMPANY, Intervening Defendant-Appellant.	)	

Andrew T. Dalton, Jr. and James Khourie (James Ikard, on the brief), for Plaintiffs-Appellees.

Charles E. Biblowit, Attorney, Department of Justice (Wallace H. Johnson, Assistant Attorney General, and

Carl Strass and Dennis A. Dutterer, Attorneys, Department of Justice, on the brief), for Defendants-Appellants.

Thomas C. Watson of Morgan, Lewis & Bockius and F. Paul Thieman, Jr. of Crowe and Thieman (Edwin Kronfeld of Morgan, Lewis & Bockius and Gordon B. Cecil of Crowe & Thieman, on the brief), for Intervening Defendant-Appellant.

Before LEWIS, Chief Judge, and McWILLIAMS and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

This is an appeal from an order, judgment and decree of the United States District Court for the Eastern District of Oklahoma in which the defendants-appellants were enjoined pending the preparation of an environmental impact study "of the effects of the Flint Ridge Development on the quality of the human environment" by the Secretary of Housing and Urban Development and Office of the Interstate Land Sales Registration, a division of the Department of Housing and Urban Development. The essential holding of the trial court was that the responsibilities of the Department of Housing and Urban Development were of such a nature as to require the preparation of an impact statement pursuant to the requirements of the National Environmental Policy Act, 42 U.S.C. § 4331 et seq.

The action herein was filed on April 24, 1974 by the Scenic Rivers Association and the Illinois River Conservation Council. Named as defendants were Lynn, Secretary of the Department of Housing and Urban Development (HUD) and Bernstein, Administrator of the Office of Interstate Land Sales Registration (OILSR). In this suit a declaratory judgment was sought that HUD must conduct an environmental study and file an impact statement prior to its approval of a filing with the OILSR. Also sought was an injunction pending a determination in the case, together with the issuance of a mandatory order compelling the Secretary to comply with NEPA. In addition, plaintiffs sought a preliminary injunction requiring HUD to withdraw approval of the statement of record and property report which had been filed by Flint Ridge Development Company on February 5, 1974.

Flint Ridge was engaged in developing an area along the Illinois River in Oklahoma. In order to do so it was required to file certain documents under the Interstate Land Sales Act, 15 U.S.C. § 1701 et seq. This is a prerequisite to the sale of lots in commerce. The original filing of Flint Ridge was determined to be inadequate and an amended statement of record was filed by Flint Ridge. This was effective as of May 2, 1974, that is, after the filing of the present lawsuit.

The order that is now being reviewed was issued following a hearing on preliminary injunction on July 31, 1974. Flint Ridge had been allowed to intervene and the hearing on injunction was merged with the hearing on the merits. Evidence was presented, and on August 2, 1974, the ruling from the bench which was later formalized in findings and opinion held that HUD was required to prepare an impact statement. The court

further ordered that the Flint Ridge statement be suspended. Later, on September 4, 1974, the trial court filed its findings of fact and conclusions of law and an order. This enjoined HUD and OILSR from approving the Flint Ridge filing until an environmental impact study had been prepared and a hearing held thereon. The court ordered immediate withdrawal of the approval which had been given May 2 and ordered defendants-appellants to comply with the NEPA procedures.

The effect of the court's orders suspending the statement of record was that it forbade interstate sales until further order of the court. Unquestionably the development would have had a substantial impact on the environment inasmuch as the Illinois River is a state-designated scenic river. Three thousand lots were to have been sold. On each would have been a home with a septic tank for disposal of human refuse, which refuse would have contaminated the river. The trial court considered this fact in determining that the filing with HUD and OILSR was major federal action which would significantly affect the quality of the human environment.

The government agencies and Flint Ridge are the appellants in the present proceedings. They contend that the court erred:

1) In holding that the filing under the Interstate Land Sales Act constituted major federal action;

2) In ruling that an impact statement had to be prepared prior to the approval of a filing. The contention was here that to so read the National Environmental Policy Act is to create an irreconcilable conflict between NEPA and the Interstate Land Sales Act;

3) In requiring a public hearing;

4) In ruling that there was jurisdiction to consider the question as to whether NEPA limited the Interstate Land Sales Act and to enjoin the actions of HUD and OILSR in deference to the provisions of NEPA.

I.

The first question is whether NEPA applies to the actions of the OILSR. The relevant provision of NEPA requires that "to the fullest extent possible" all agencies of the Federal Government shall prepare a detailed environmental impact statement for all "major Federal Actions significantly affecting the quality of the human environment."[1] The defendants-appellants take the

[1] The relevant NEPA provision as read in context furnishes a better picture of its requirements:

> The Congress authorizes and directs that, to the fullest extent possible . . . all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on–
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

position that review of the statements of record which are required to be filed under the Interstate Land Sales Act does not constitute major federal action. As we have above shown, the district court disagreed with this and enjoined OILSR from approving the statement of record until it had filed an impact statement. Therefore, the question boils down to whether the action on the part of OILSR constitutes a major federal action significantly affecting quality of the human environment. The argument is that the action is largely a private one involving as it does the filing of the statement, but it is more than that because OILSR does have the authority to suspend a statement, the effect of which is to cut off raising funds in interstate which would be otherwise available. Thus, this allows the Federal Government to suspend a private action which would unquestionably affect the environment.

Our decision in Davis v. Morton, 469 F.2d 593 (10th Cir. 1972) dealt with a matter which was very similar to that here presented. A 99-year lease of Indian lands was executed by the Pueblo of Tesuque. The lease was to the Sangre de Cristo Development Company, Inc. as lessee. The district court there held that the Secretary of the Interior was not required to file an impact statement prior to approval or disapproval of a lease between the Tribe and the developer. The trial court was impressed by the fact that the United States had not initiated the lease, was not a party, had no interest and the government action was limited to approval or disapproval. Our court reversed. holding that the Secretary's authority to ratify or reject leases on Indian lands would come within the terms of NEPA. The opinion quoted the broad purposes of NEPA as set forth in 42 U.S.C. § 4331(b) as showing the intention

of Congress to preserve the environment.[2] Cited with approval was Greene County Planning Board v. Federal Power Comm'n, 455 F.2d 412 (2d Cir. 1972), holding that the granting of a license to construct a high voltage line constituted major federal action. Also relied on was Izaak Walton League of America v. Schlesinger, 337 F. Supp. 287 (D.D.C. 1971), requiring the Atomic Energy Commission to prepare an environmental impact statement before issuing an interim operating license for a nuclear power plant.

The similarity between our case and *Davis* is that both involve filing and approval of private action. The result of approval here is that the developer is free to seek funds in commerce for the development. In each instance the filing is a preliminary step which is followed by substantial consequences to the environment; thus, there is action which leads to the development which in turn affects the human environment.

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[2] The court said:

> [I]t is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to . . . (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings; (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice; . . . .

469 F.2d at 596.

There are many cases which hold that the impact resulting from governmental funds is capable of significantly affecting the quality of the environment, a condition which is not far different from ours.[3]

It is true that funding could be obtained within the State of Oklahoma even without approval, but obviously the obtaining of funds interstate is important. If it were not important, Flint Ridge would not be litigating the present issue.

An analogy is shown in the case of the giving of a guarantee by HUD. This has a significant affect. *See* Sierra Club v. Lynn, 502 F.2d 43 (5th Cir. 1974); Silva v. Lynn, 482 F.2d 1282 (1st Cir. 1973). *See, also,* National Resources Defense Council, Inc. v. S.E.C., 389 F. Supp. 689 (D.D.C. 1974) in which it was held that NEPA applies to S.E.C. offerings. The filing with the

[3] *See* Proetta v. Dent, 484 F.2d 1146 (2d Cir. 1973) (Economic Development Administration loan commitment to finance a portion of construction costs for expanding a private plant); Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973) (HUD loan and grant); Silva v. Romney, 473 F.2d 287 (1st Cir. 1973) (HUD mortgage guarantee and interest grant for private housing project); San Francisco Tomorrow v. Romney, 472 F.2d 1021 (9th Cir. 1973) (HUD loan and grant); Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693 (2d Cir. 1972) (Department of Transportation determination to fund highway); City of Boston v. Volpe, 464 F.2d 254 (1st Cir. 1972) (Federal Aviation Agency funding for airport extension); Upper Pecos Ass'n v. Stans, 452 F.2d 1233 (10th Cir. 1971), *vacated and remanded on other grounds*, 406 U.S. 944 (1972) (Economic Development Administration grant for construction of highway); Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971) (Law Enforcement Assistance Administration approval of funds for construction of rehabilitation center).

S.E.C. is not dissimilar to a filing under the Interstate Land Sales Act.

In sum, then, the consequences of the government's approval of the statement in terms of ease of obtaining funds and in terms of the ultimate direct consequences on the environment of the building of the houses lead to the conclusion that the district court was correct in holding that major federal action significantly affecting the quality of the human environment was present.

II.

Appellants further maintain that the Interstate Land Sales Act is by its terms inconsistent with NEPA in that it requires that the statement of record filed by the land developer become effective 30 days after it is filed unless the agency acts to suspend it, whereas the NEPA procedure has a minimum requirement of 75 days. The argument goes that it is impossible for the Office of Interstate Land Sales to comply. We regard this as superficial. Clearly, Congress put the automatic 30 day provision in the Act out of concern about possible delay of agency action and in turn the interstate land sales. There is nothing in the statute, however, which prohibits the agency from suspending a statement of record pending the preparation and filing of an impact statement. The First Circuit has suggested that HUD promulgate regulations designed to preserve the status quo during the period of preparation of the impact statement. *See* Silva v. Romney, 473 F.2d 287 (1st Cir. 1973). Thus, a developer could give advance notice to HUD of its intent to sell land in interstate commerce, whereby HUD could commence the preparation of its

impact statement. There is evidence that Congress never intended for the 30 day provision to be absolute so as to exclude the applicability of NEPA; evidence the fact that it allowed the statement of record to be suspended.

The other argument advanced is that Congress showed its intention that the NEPA requirement was not applicable. This again loses sight of the fact that the NEPA impact statement requirement applies to virtually all federal agencies and is not limited to those that are concerned with the environment. One of its purposes is to require the giving of attention to environmental problems regardless of whether the agency has authority to do anything about it.[4]

The Supreme Court has held in one case that the ICC was not required to prepare an impact statement. *See* United States v. S.C.R.A.P., 412 U.S. 669 (1973). The ICC had refused on a temporary basis to suspend a proposed rate increase. While it was determining whether the rate increase ought to be suspended permanently, the district court enjoined it from approving the rate increase as to recycled goods until it had filed a NEPA impact statement. By the terms of the statute, however, the rate suspension question was placed in the exclusive jurisdiction of the ICC during

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[4] *See* Jones v. Lynn, 477 F.2d 885, 891 (1st Cir. 1973); Monroe County Conservation Council, Inc. v. Volpe, 472 F.2d 693, 697 (2d Cir. 1972); Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 787 (D.C. Cir. 1971); Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 833 (D.C. Cir. 1972); National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971).

the seven month consideration period as to whether the rate should be suspended. The Supreme Court had so construed the statute in Arrow Transportation Co. v. Southern Ry. Co., 372 U.S. 658 (1963). The fact that the Supreme Court decided to review this case and thus regarded the question whether the ICC *might* have to file a NEPA statement shows the broad sweep and range of the NEPA requirement and demonstrates that it is not to be lightly disregarded. Certainly the presence of the 30-day requirement does not create inconsistency or an impediment to requiring the agency to prepare an impact statement.

Finally, it is readily apparent that these statutes, NEPA and Interstate Land Sales, are not incompatible. Both are designed to give information to the public, but in each instance it is a different kind of information. Rather than being inconsistent or incompatible they complement one another in furnishing the public with a full range of information.

III.

Did the district court lack jurisdiction to hear and determine this matter as a federal question case? We have heretofore recognized that the district court is authorized to entertain a case such as this one arising under federal law. *See* National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971). We there held that the National Helium Corp. could challenge the termination of government contracts, which terminations were taking place without first observing the requirements of NEPA. In that instance also it was by way of the injunction. National Helium recognized that

the underlying substantive federal question was the NEPA requirement. Also, our decision in Davis v. Morton, 469 F.2d 593 (10th Cir. 1972) impliedly held that several kinds of federal violations gave rise to district court jurisdiction to compel the government agency to comply with the mandates of NEPA.

Flint Ridge maintains, however, that the Interstate Land Sales Act has a provision for review by the court of appeals and that this precludes district court action. This statute declares.

> Any person, aggrieved by an order or determination of the Secretary issued after a hearing, may obtain a review of such order or determination in the court of appeals of the United States . . . by filing in such court, within sixty days after the entry of such order or determination, a written petition praying that the order or determination of the Secretary be modified or be set aside in whole or in part . . . Upon the filing of such petition, the jurisdiction of the court shall be exclusive . . . .

15 U.S.C. § 1710(b).

Thus, this act provides for hearings on the request of a developer when the Secretary suspends the statement prior to its effective date for the purpose of obtaining additional information and, too, for review of an order of the Secretary when he wishes to suspend a statement of record already in effect. 15 U.S.C. § 1706(b) and (d). Such hearings are public ones in which a record is made.

It is plain from a reading of the statute that this procedure does not apply here because the agency action for which review is provided has not here taken place and could not take place because it is entirely out of context with the present problem.

Nor does Anaconda v. Ruckelshaus, 482 F.2d 1301 (10th Cir. 1973) apply. In *Anaconda* the effort was to bypass review by the appropriate court of appeals.

We have examined the other decision relied on, namely, Environmental Defense Fund v. Environmental Protection Agency, 485 F.2d 780 (D.C. Cir. 1973). That one is also plainly inapplicable.

The Supreme Court's decision in *S.C.R.A.P., supra,* is entirely consistent with the position we take because there the effort was to interfere with the decision of an administrative tribunal which Congress and the Supreme Court had recognized was within the exclusive jurisdiction of the tribunal.

The case of Adolphus v. Zebelman, 486 F.2d 1323 (8th Cir. 1973) has recognized that a district court has jurisdiction to enjoin a developer from making interstate land sales when its statement of record violates the Act.

Because, then, of the broad scale application of NEPA and the manifest intention of Congress that all federal agencies with responsibilities which effect the environment must observe its requirements, the jurisdiction of the district court is present.[5]

IV.

Was the district court correct in its ruling that there should be a public hearing in connection with the

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[5] We deem it unnecessary to discuss the issue of standing because it is not seriously contended that the plaintiffs here lacked standing to bring the suit.

environmental impact statement? We agree with HUD that the question whether a public hearing is to be held is within the agency's discretion. The statute does not prescribe that the hearing be either public or adversary. The courts have consistently held to this proposition.[6]

HUD's proposed regulations do not require public hearings in all cases, and the Proposed Rules § 50.20 hold that the question whether a public hearing shall be held on a draft environmental impact statement is an administrative decision. This regulation outlines the factors to be considered: magnitude of the proposal, degree of interest, complexity of the issue and the extent to which public involvement has been achieved. The appellees contend that the Flint Ridge development meets all the criteria. As noted, however, this is an agency question. The present action is to compel compliance with the mandatory requirements of NEPA. Obviously the holding of a public hearing is not mandatory.

The judgment of the district court is affirmed in all respects except the requirement of a public hearing. That holding is reversed.

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[6] Jicarilla Apache Tribe v. Morton, 471 F.2d 1275 (9th Cir. 1973); National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971); Natural Resources Defense Council, Inc. v. TVA, 367 F. Supp. 128 (E.D. Tenn. 1973), *aff'd*, 502 F.2d 852 (6th Cir. 1974); Ford v. Train, 364 F. Supp. 227 (W.D.Wis. 1973); Citizens for Clear Air, Inc. v. Corps of Engineers, U.S. Army, 356 F. Supp. 14 (S.D.N.Y. 1973); City of New York v. United States, 344 F. Supp. 929 (E.D.N.Y. 1972); San Francisco Tomorrow v. Romney, 342 F. Supp. 77 (N.D. Cal. 1972), *rev'd in part on other grounds*, 472 F.2d 1021 (9th Cir. 1973).

Before The Honorable David T. Lewis, Chief Judge, The Honorable Robert H. McWilliams and The Honorable William E. Doyle, Circuit Judges

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA and THE ILLINOIS RIVER CONSERVATION COUNCIL, corporations,	)	
Plaintiffs-Appellees,	)	
vs.	)	No. 74-1520
	)	No. 74-1750
JAMES T. LYNN, Secretary of Housing and Urban Development, and GEORGE K. BERNSTEIN, Administrator of Interstate Land Sales, Department of Housing and Urban Development,	)	(D.C. No. 74-131-C)
Defendants-Appellants,	)	
and	)	
FLINT RIDGE DEVELOPMENT COMPANY,	)	
Intervening Defendant-Appellant.	)	

This cause came on to be heard on the record on appeal from the United States District Court for the Eastern District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed in all respects except

the requirement of a public hearing. The district court's ruling that there should be a public hearing is reversed. The cause is remanded to the United States District Court for the Eastern District of Oklahoma for further proceedings consistent with the opinion of this Court.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA, and THE ILLINOIS RIVER CONSERVATION COUNCIL, corporations, Plaintiffs, vs. JAMES T. LYNN, Secretary of Housing and Urban Development and GEORGE K. BERNSTEIN, Administrator of Interstate Land Sales, Department of Housing and Urban Development, Defendants, and FLINT RIDGE DEVELOPMENT CO., a joint venture, Intervening Defendant, and THE UNITED STATES OF AMERICA, ex rel The Environmental Protection Agency, Additional Defendant.	)	No. 74-131-C Filed: September 4, 1974

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Statement of Case

The Scenic Rivers Association of Oklahoma, an Oklahoma non-profit corporation, and The Illinois River Conservation Council, Inc., a non-profit Oklahoma

corporation, filed this action in this court for the following reasons:

1. Plaintiffs seek a declaratory judgment decreeing that the Department of Housing and Urban Development, the agency in charge of administering the Interstate Land Sales Act, 15 U.S.C. §1701 et seq., must, prior to approval and registration of a Statement of Record and Property Report under the Interstate Land Sales Act, conduct an environmental impact study in compliance with the National Environmental Policy Act, 42 U.S.C. §4331 et seq., and the guidelines of the Council on Environmental Quality and the Department's own guidelines promulgated under the National Environmental Policy Act requirements.

2. Plaintiffs further seek injunctive relief requiring H.U.D. to withdraw approval of Interstate Land Sales filings pending the Environmental Review Process as same pertains to the Property Report and Statement of Record filed by Flint Ridge Development Co. effective May 2, 1974.

Flint Ridge Development Co. joined these proceedings as an intervening defendant on the morning this case was brought to trial, first requesting to appear as *Amicus Curiae*, which request was denied. Then Flint Ridge Development Co. was permitted to intervene as a party defendant with the understanding that it could withdraw at the end of the trial if it chose to do so. The Court finds now that Flint Ridge Development Company may withdraw if it chooses to do so, but to the knowledge of the Court it has not filed any written request to withdraw from these proceedings so the Court finds that Flint Ridge may or may not remain in the case as it sees fit.

This action is primarily and in all things an action against the defendants James T. Lynn, Secretary of Housing and Urban Development, and George K. Bernstein, Administrator of Interstate Land Sales, Department of Housing and Urban Development, and the United States of America, ex rel the Environmental Protection Agency, for the sole purpose of requiring these governmental agencies to comply with the Acts of Congress relating to environmental protection. This action has two principal issues for the Court to determine:

1. Whether H.U.D.'s action in approving the Property Report and Statement of Record for Flint Ridge Development Co., under the Interstate Land Sales Act, constituted major federal action; and

2. Whether the development itself, together with any peripheral developments associated therewith, would significantly affect the quality of the human environment, of which the Illinois River, its basin and tributaries, is a part.

The Court heard many learned expert witnesses who testified generally and specifically as to the actual potential result of the Flint Ridge Development Co.'s project in the counties of Delaware and Adair, Oklahoma. The Court heard testimony of the Flint Ridge Development Co., the federal defendant, H.U.D. and the Oklahoma State Departments of Health and Water Resources.

The Court, having carefully examined the files, the briefs, pleadings, testimony, exhibits and the issues involved in this case, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. The Illinois River and its basin which is situated in eastern Oklahoma beginning at the western boundary of Arkansas and continuing westerly to Lake Tenkiller near Muskogee, Oklahoma, is within the boundaries of the Eastern District of Oklahoma.

2. The plaintiffs are both residents of the State of Oklahoma and are actively engaged in the preservation of the Illinois River basin and other similar areas in Oklahoma.

3. "Flint Ridge" is a joint venture organized and promoted by Flint Ridge Development Company. The Court finds that Flint Ridge Development Co. has located its joint venture project on the Illinois River basin because of the beauty the river affords for such a development. The attractiveness of the Illinois River basin was and is the motivating factor in Flint Ridge Development Co. seeking out this specific location for promotional purposes.

4. Flint Ridge Development Co. has filed its Statement of Record and Property Report and has divided the property for the purpose of selling to prospective home builders throughout the United States and has done so by use of the United States mails.

5. Flint Ridge Development Co. proposes to sell 3,000 lots ranging in price from $6,500 to $25,000 per vacant lot. If each lot sold for $6,500, the gross revenue to the development would be $19,500,000; that if all 3,000 lots were sold at $25,000 each, the gross sales would be $75,000,000; that if the gross amounts were added together and divided by two, Flint Ridge Development Co. would have a gross income of $47,250,000. These figures reflect the magnitude of the

development and show that H.U.D.'s action in approving the Property Report and Statement of Record under the Interstate Land Sales Act constituted major federal action.

6. Flint Ridge Development Co. is a joint venture composed of Frates Development Company, Tulsa, and Flint Ridge Development Co., Inc. of Tulsa, Oklahoma. Frates Development Company is a subsidiary of Frates Properties, Inc., of Tulsa, Oklahoma, and Flint Ridge Development Co., is a wholly owned subsidiary of Context Industries, Inc., of Miami, Florida. This joint venture owns the development known as "Flint Ridge" and does business in the Eastern District of Oklahoma.

7. The Department of Housing and Urban Development is a federal instrumentality which, through its sub-agency, the Office of Interstate Land Sales, has statutory and administrative responsibilities for enforcement and administration of the Interstate Land Sales Act.

8. The plaintiff organizations are comprised of individuals and affiliated conservation outdoor organizations. Plaintiffs have filed with the Clerk of this Court a list of several thousands of signatures of individuals living in and around the eastern part of Oklahoma stating and claiming frequent and consistent use of the Illinois River for purposes of hiking, camping scouting, canoeing, fishing, swimming and general outdoor recreational purposes.

9. The United States Constitution provides that Congress shall regulate Interstate Commerce and Congress saw fit to create the statutory authority for H.U.D. to administer the Interstate Land Sales Act and also to establish the Environmental Protection Agency for the sole purpose of protecting environmental areas for the use of the citizens of this country.

10. The Illinois River is a state-designated "scenic river" and the river as a matter of fact possesses substantial esthetic qualities, which qualities in fact caused Flint Ridge Development Co. to undertake its development in this area.

11. The evidence is clear that the present and proposed development by Flint Ridge Development Co. comprises approximately 7,000 acres, with an ultimate proposal of acquiring an additional 14,000 acres.

12. The Court finds that each lot sold and home built will contain a septic tank for all human refuse. Upon completion of the project 3,000 septic tanks will dispose refuse into the Illinois River. The soil in this particular area is made up primarily of limestone gravel, chert rock or gravel and clay, and that the soil is very porous and the seepage from the 3,000 septic tanks will soon find its way into the clear waters of the Illinois River and cause pollution damage thereof and destroy forever the environmental quality of the Illinois River Basin.

13. It is important to remember that plaintiffs made demand upon H.U.D. to prepare an environmental impact statement prior to approval of the Statement of Record and Property Report. This H.U.D. refused to do. The Court finds that H.U.D.'s refusal to prepare the environmental impact statement and to perform its duty under the guidelines of the National Environmental Policy Act, the Council of Environmental Quality or its regulations was serious dereliction of its duty imposed upon it by Congress.

14. Flint Ridge Development, together with its peripheral developments has actual or potential substantial effect upon the depth and course of the Illinois River, its tributaries and drainage area, to the plant life,

the wildlife habitats, the fish and wildlife, soils, air, esthetics of the area and upon the socio-economic conditions in the area including such matters as health and hospital care and facilities, roads and highways, schools, police and fire protection.

15. Flint Ridge Development Co. is an organization which directly or indirectly sells or leases, or offers to sell or lease, or advertise for sale or lease, lots in a subdivision, containing more than 50 lots, pursuant to a common sales scheme and in Interstate Commerce.

16. Under the Interstate Land Sales Act the Office of Interstate Land Sales, a sub-agency of the Department of Housing and Urban Development, has the authority and duty to issue rules and regulations providing for an exemption from the provisions of the Act, the authority to review filings under the Act, and to note deficiencies therein (thereby suspending the effectiveness of the filing until such time additional information as the Secretary shall require is provided and the deficiencies corrected), the authority to conduct hearings and make findings and conclusions with respect thereto in connection with filings under the Act, the authority to suspend the effectiveness of the Statement of Record and Property Report under amendments filed subsequent to the effective date of the Act of the filings, the authority to suspend the Statement of Record upon a finding of any untrue statement of a material fact or omission to state any material fact required to be stated or necessary to make the statements not misleading, and the authority to conduct investigations and initiate criminal prosecutions for violation of the provisions of the Interstate Land Sales Act.

That upon the initial filing of the Statement of Record and Property Report by Flint Ridge Development Co., the Office of Interstate Land Sales did in fact find deficiencies and did in fact suspend the effectiveness of the Statement of Record in excess of 30 days from the filing date and according to the testimony of an official representative of the Office of Interstate Land Sales that Flint Ridge Development Co. was prohibited from selling lots during the period of this suspension.

17. That whenever a Federal agency makes a decision which permits action by other parties, public or private, which will affect the quality of the human environment, such decision constitutes major federal action, which is what occurred in this case. *Scientists' Institute for Public Information, Inc. v. A.E.C.*, 481 F.2d 1079 (C.A. D.C. Cir., 1973).

18. That there is an overriding public interest in preservation of the character of the area described generally as the Illinois River Basin and that the public interest in preserving the character of that ecosystem is one that the plaintiffs may seek to protect by obtaining equitable relief. *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (C.A. 10, 1973).

19. That the Department of Housing and Urban Development by its sub-agency, the Office of Interstate Land Sales, has not brought its policies and procedures into compliance with requirements of the National Environmental Policy Act, Title 42 U.S.C. Sec. 4333, in that they have no rules, regulations or guidelines promulgated so as to enable them to comply with the National Environmental Policy Act's purposes and intendments.

20. That the defendant, H.U.D., and the Office of Interstate Land Sales, in administering and enforcing the Interstate Land Sales Act and making decisions associated with such administration and enforcement, have not, in whole or in part, complied with any of the mandatory requirements contained in 42 U.S.C. Sec. 4332.

Conclusions of Law

1. The Court has jurisdiction and venue (28 U.S.C. §1391(e)) over the instant case and the plaintiffs have standing to bring this action.

2. The National Environmental Policy Act applies to all Federal agencies and their subdivisions and requires that all Federal agencies "to the fullest extent possible" must strictly comply with the requirements of the National Environmental Policy Act. The Court further finds as a matter of law that every Federal agency, at the lowest possible level, is required to consider the effects of each decision made by that agency upon the environment and to use all practicable means to avoid environmental degradation. *Calvert Cliffs' Coordinating Committee v. A.E.C.*, 449 F.2d 1109 (C.A.D.C., 1971) cert. denied, 494 U.S. 942 (1972); *Davis v. Morton*, 469 F.2d 593 (C.A. 10, 1972); *Ely v. Velde*, 451 F.2d 1130 (C.A. 4, 1971); See, *National Helium Corporation v. Morton*, 455 F.2d 650 (C.A. 10, 1971).

3. There is nothing contained within the Interstate Land Sales Act which specifically excludes N.E.P.A. application. See, *Davis v. Morton, supra.*

4. H.U.D. contends there is no major federal action involved. The concept of major federal action has

evolved from the concept of Federal planning, participation in, funding or benefit from a project, See *Natural Resources, Inc. v. Grant*, 341 F. Supp. 356 (E.D.N.C., 1972), to include those federal actions taken as a result of an agency decision which permits an action by other parties which will affect the quality of the human environment. *Scientists' Institute for Public Information, Inc. v. A.E.C.*, 481 F.2d 1079 (C.A.D.C. Cir. 1973). Nowhere is the evolution of the concept of major federal action more complete than in the Tenth Circuit. *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244 (C.A. 10, 1973); *Davis v. Morton, supra; National Helium Corporation v. Morton, supra.* These cases hold and reflect that N.E.P.A. is intended to interrupt business-as-usual and to affect the decision-making process at the lowest agency level. N.E.P.A., with its unequivocal command to implement its policy, "to the fullest extent possible" does not render the procedural requirements discretionary. *Calvert Cliffs' Coordinating Committee v. A.E.C., supra; Ely v. Velde*, 451 F.2d 1130 (C.A. 4, 1971).

The decision of the Interstate Land Sales Office to either approve or suspend or to ascertain that deficiencies exist, or have been corrected, in the Statement of Record or Property Report, is major federal action. The case of *Davis v. Morton, supra*, together with the cases cited therein, hold that major federal action exists when the only action was approval by the Government of a project, licensing, permitting a project or enterprise or abandoning a railroad line. In the *Davis* case the sole federal action involved was an approval, under a delegation of powers, or a lease of Indian lands by a local Department of Interior official.

5. Where a federal license or permit is involved, or where Congress possesses and has utilized its plenary power of regulation under the Interstate Commerce Clause, or other Constitutional authority, federal approval constitutes major federal action. The approval of a filing under the Interstate Land Sales Act is in the nature of a federal license or permit, for without the approval it is unlawful to engage in sales and Congress has exercised its plenary power under the Interstate Commerce Clause by enacting the Interstate Land Sales Act.

6. The National Environmental Policy Act compels Federal agencies to review and reappraise existing policies and procedures in light of developing law and in light of developing agency awareness of environmental factors, 42 U.S.C. §4332. "The Sweep of N.E.P.A. is extraordinarily broad, compelling consideration of any and all types of environmental impact on federal action," *Calvert Cliffs' Coordinating Committee v. A.E.C., supra.*

7. Plaintiffs must establish an overriding public interest in the preservation of the character of the area under concern and that there is a threat of environmental injury without compliance of N.E.P.A.'s procedures. *Wyoming Outdoor Coordinating Council v. Butz, supra; Calvert Cliffs' Coordinating Committee v. A.E.C., supra*. The Court concludes as a matter of law that the plaintiffs have met this burden.

8. One of the burdens of plaintiffs is to demonstrate either actual or potential or threatened results that will significantly affect the quality of the human environment. *Wyoming Outdoor Coordinating Council v. Butz, supra.* The Court further concludes that it is one of the purposes of the National Environmental Policy Act to

determine with more exactitude what the actual or potential environmental impacts would be and to take steps to minimize or prevent both long-range and short-range impacts. The Court finds as a matter of law that the plaintiffs have met this burden.

9. As a general rule these impacts include, but are not limited to, effects upon the depth or course of stream, plant life, wildlife habitats, fish and wildlife, soil, the air, the quality of water, social and economic impacts, and effects upon esthetics and recreational opportunities. *Natural Resources, Inc. v. Grant, supra.* The Court notes from its findings of fact and conclusions of law that the plaintiffs have demonstrated actual and potential environmental effects in all of these areas, and therefore, that the decision to approve the Statement of Record and Property Report by H.U.D. of Flint Ridge Development Co. is a major federal action which "significantly affects the quality of the human environment."

10. The Court further concludes, as a matter of law, that any attorney fees and costs to be assessed against the defendant, United States of America, or the Flint Ridge Development Co. shall be heard and considered upon proper application after the action of this Court has become final or after a final Order of any appellate court.

An appropriate Order and Judgment will be entered accordingly herein.

Dated this 4th day of September, 1974.

/s/ Luther Bohanon
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA, and THE ILLINOIS RIVER CONSERVATION COUNCIL, corporations, Plaintiffs, vs. JAMES T. LYNN, Secretary of Housing and Urban Development and GEORGE K. BERNSTEIN, Administrator of Interstate Land Sales, Department of Housing and Urban Development, Defendants, and FLINT RIDGE DEVELOPMENT CO., a joint venture, Intervening Defendant, and THE UNITED STATES OF AMERICA, ex rel The Environmental Protection Agency, Additional Defendant.	)	No. 74-131-C Filed: Sept. 4, 1974

ORDER, JUDGMENT AND DECREE

Based upon the Findings of Fact and Conclusions of Law this day filed, IT IS THE ORDER, JUDGMENT AND DECREE OF THIS COURT that:

1. The Department of Housing and Urban Development and the Office of Interstate Land Sales be, and they are hereby enjoined and restrained from approving the Interstate Land Sales filing of Flint Ridge

Development Co. until such time as the environmental impact study has been prepared and a public hearing held thereon, and further the Department of Housing and Urban Development and the Office of Interstate Land Sales of that Department are hereby ordered to immediately withdraw the approval of the Flint Ridge Development Co. filing which was effective May 2, 1974, and not to reinstate said approval until the further Order of this Court.

2. Plaintiff will post bond in the amount of $100.00.

3. The Department of Housing and Urban Development of the United States Government shall conduct a full, thorough and complete environmental impact study of the effects of the Flint Ridge development on the quality of the human environment and that they specifically and in detail address themselves to the following:

(a) The environmental impact of the proposed actions;
(b) Any adverse environmental effects which cannot be avoided should the proposal be implemented;
(c) Alternatives to the proposed action, including no action;
(d) The relationship between the local short-term uses of man's environment and the maintenance and the enhancement of long-term productivity;
(e) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The Department of Housing and Urban Development is further ordered to consult with, and obtain the comments of, any and all other federal agencies which have jurisdiction by law or special expertise with respect to any environmental impact involved.

4. Upon completion of the impact study, a copy thereof shall be filed with this Court.

5. The environmental impact statement shall be made available to the President of the United States, the Council on Environmental Quality and to the public as provided by Title 5 U.S.C. §552 and Title 42 U.S.C. §4332(C).

6. The injunction and restraining order set out in paragraph 1 hereof shall be administered by James T. Lynn, Secretary of Housing and Urban Development and his successor and by George K. Bernstein, Administrator of Interstate Land Sales, Department of Housing and Urban Development and his successor. That a certified copy of this Order shall be served by registered mail upon James T. Lynn and George K. Bernstein at HUD Building, 451 Seventh Street S.W., Washington, D.C. 20410.

7. It is specifically Ordered that the property report and statement of record filed by Flint Ridge Development Company, a joint venture, be, and the same are hereby suspended, vacated and held for naught, and no further public sales shall be conducted thereunder unless and until further Order of the Court.

A certified copy of this Order shall be delivered by registered mail to Flint Ridge Development Company c/o F. Paul Thieman, Jr., Attorney, 5800 East Skelly Drive, Tulsa, Oklahoma 74135.

Dated this 4th day of September, 1974.

/s/ Luther Bohanon
UNITED STATES DISTRICT JUDGE

APPENDIX C

STATUTES INVOLVED

Interstate Land Sales Full Disclosure Act, United States Code, Title 15

§1706.

(a) Except as hereinafter provided, the effective date of a statement of record, or any amendment thereto, shall be the thirtieth day after the filing thereof or such earlier date as the Secretary may determine, having due regard to the public interest and the protection of purchasers. If any amendment to any such statement is filed prior to the effective date of the statement, the statement shall be deemed to have been filed when such amendment was filed; except that such an amendment filed with the consent of the Secretary, or filed pursuant to an order of the Secretary, shall be treated as being filed as of the date of the filing of the statement of record. When a developer records additional lands to be offered for disposition, he may consolidate the subsequent statement of record with any earlier recording offering subdivided land for disposition under the same promotional plan. At the time of consolidation the developer shall include in the consolidated statement of record any material changes in the information contained in the earlier statement.

(b) If it appears to the Secretary that a statement of record, or any amendment thereto, is on its face incomplete or inaccurate in any material respect, the Secretary shall so advise the developer within a reasonable time after the filing of the statement or the

amendment, but prior to the date the statement or amendment would otherwise be effective. Such notification shall serve to suspend the effective date of the statement or the amendment until thirty days after the developer files such additional information as the Secretary shall require. Any developer, upon receipt of such notice, may request a hearing, and such hearing shall be held within twenty days of receipt of such request by the Secretary.

* * *

(d) If it appears to the Secretary at any time that a statement of record, which is in effect, includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Secretary may, after notice, and after opportunity for hearing (at a time fixed by the Secretary) within fifteen days after such notice, issue an order suspending the statement of record. When such statement has been amended in accordance with such order, the Secretary shall so declare and thereupon the order shall cease to be effective.

§1716.

The fact that a statement of record with respect to a subdivision has been filed or is in effect shall not be deemed a finding by the Secretary that the statement of record is true and accurate on its face, or be held to mean the secretary has in any way passed upon the merits of, or given approval to, such subdivision. It shall be unlawful to make, or cause to be made, to any prospective purchaser any representation contrary to the foregoing.

National Environmental Policy Act of 1969, United States Code, Title 42

§4332.

The Congress authorizes and directs that, to the fullest extent possible: * * * (2) all agencies of the Federal Government shall–

* * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on–

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized

to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

* * *

§4333.

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this chapter.

§4334.

Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

§4335.

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.